IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.258 OF 2007

Lalaprasad Ramjatan Yadav ...Appellant

Versus

Ramanand Ramjatan Yadav ...Respondent

Shri Pankaj Kowli with Shri Imtiaz A. Raibakkar for the Appellant.
Shri M.V.Holamagi for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 12, 2007.

P.C.:

1. Submissions of the learned Advocates appearing for the parties were heard yesterday. By consent taken up for final hearing. The Appeal is by the original Defendant challenging order dated 17th March, 2007 passed by the learned Judge of the City Civil Court, Bombay by which Notice of Motion taken out by the Respondent Plaintiff has been allowed. Apart from other legal submissions, the learned Advocate for the Appellant submitted that the learned trial Judge has relied upon report of the Commissioner without taking into consideration detailed objections raised by the Appellant in the form of his affidavit filed on 09th March, 2007 as well as an affidavit of the Advocate for the Appellant filed on the same day. He submitted that the learned Judge ought to have considered the objections raised to the report of the Court Commissioner. He submitted that the order impugned is

based only on the report of the Commissioner. He urged that the report of the Court Commissioner has been misread by the trial Court.

2. When this Appeal was called out on 10th April, 2007 time was granted to the learned Advocate for the Respondent to ascertain whether the aforesaid two affidavits were on record of the trial Court. Yesterday when the Appeal was heard, the learned counsel for the Respondent fairly stated that both the affidavits are on record of the trial Court. He, however, submitted that there is no error in the approach of the learned Judge when he relied upon the report of the Commissioner and there was other material available on record to justify the order which has been passed.

3. I have considered the submissions. Perusal of the impugned order and in particular paragraph No.5 thereof shows that the learned trial Judge has relied upon the observations made by the Court Commissioner which are incorporated in the report of the Court Commissioner. Apart from the fact that the suit house stands in the joint names of the parties, the order is based only on the observations made by the Commissioner in his report. Perusal of the affidavits filed by the Appellant and his Advocate by way of objection to the Commissioner’s report shows that there is a very serious

challenge not only to the contents of the report but also to the actions of the Court Commissioner.

4. Under the provisions of Order XXVI of the Code of Civil Procedure, 1908 the Court is required to consider the objections to the Commissioner's report. In the present case, it is obvious that Court has not at all considered the objections raised in the form of the affidavits which are referred to above. Infact, considering the nature of the objections, the learned trial Judge ought to have granted an opportunity to the Respondent Plaintiff to deal with the said objections by filing appropriate affidavits.

5. In view of this error committed by the learned trial Judge, the impugned order deserves to be set aside and the notice of motion will have to be heard and decided afresh by the trial Court. Status-quo as prevailing on 17th March, 2007 will have to be maintained by the parties till the notice of motion is decided finally.

6. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 17th March, 2007 is quashed and set aside and Notice of Motion No.371 of 2007 is restored to the file

of the trial Court.

(ii) The trial Court will permit the original Plaintiff to file affidavit/affidavits for dealing with the objections filed by the Appellant Defendant to the report of the Commissioner.

(iii) The trial Court will hear and decide the Notice of Motion afresh after taking into account the aforesaid affidavits filed by the parties.

(iv) The Notice of Motion shall be heard and disposed of as expeditiously as possible and preferrably on or before 18th June, 2007.

(v) Till the final disposal of Notice of Motion, the parties to the suit will maintain status-quo as prevailing on 17th March, 2007.

(vi) All contentions of the parties are expressly kept open.

(vii) Appeal is partly allowed in above terms with no orders as to costs.

(viii) Parties and the concerned Court to act upon an

authenticated copy of this order.

JUDGE